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Deployment of Wireline Services Offering	)	CC Docket 98-147
Advanced Telecommunications Capability	)	
	)	

COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION AND THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELEPHONE COMPANIES

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COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION AND THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELEPHONE COMPANIES

The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) submit these comments in response to the August 6, 1998 Notice of Proposed Rulemaking (NPRM).[1] NRTA and OPASTCO's members all qualify as "rural telephone companies"[2] (rural ILECs) under the Telecommunications Act of 1996 (1996 Act).[3]

I. INTRODUCTION AND SUMMARY

The 1996 Act seeks to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by

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[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188 (rel. August 7, 1998).
[2] Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 *et seq.*
[3] Section 3(47), codified as 47 U.S.C. §153(47).

opening all telecommunications markets to competition."[4] Section 706 requires the Commission to monitor and, when necessary, to take action to stimulate the timely nationwide deployment of advanced capabilities and services.

Notwithstanding Congress's plain preference for marketplace, non-regulatory development where possible, the NPRM looks to increased regulatory burdens and mandates for ILECs as the cost for their participation in the dynamic, unfettered development of advanced capabilities and services Congress contemplated. To condition rural ILECs' regulatory flexibility and market-based business decisions about advanced capabilities on corporate and operational separation, let alone on relinquishing the principles behind §251(f)'s rural safeguard from the extreme regulatory micro-management that §251(c) applies to other incumbent LECs, will have exactly the opposite effect from what the law contemplates: Section 706 directs the Commission to use "forbearance ... and other regulating methods that remove barriers to infrastructure investment" to encourage deployment of advanced capabilities. Instead, the Commission proposes new regulatory obstacles that will diminish ILECs' incentives and ability to overcome the inherent economic challenges to meeting evolving telecommunications needs in their high cost rural markets. The Commission cannot encourage the deployment of advanced services in rural areas by making such deployment more difficult for rural ILECs.

II. THE NPRM'S PROPOSED SEPARATE AFFILIATE REQUIREMENTS WILL THWART THE GOALS OF CONGRESS AND THE COMMISSION

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[4] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996).

AND PLACE UNNECESSARY AND ANTICOMPETITIVE BURDENS ON LECS

The NPRM requires ILECs that wish to offer wireline broadband services on an unregulated basis to establish completely separate affiliates.[5] This requirement is at odds with the goal of both Congress and the Commission to rapidly deploy advanced broadband services at affordable rates in all regions of the nation. Placing such an onerous regulatory burden only on incumbents clearly contradicts not only the de-regulatory nature of the 1996 Act, but also the NPRM itself. Consistent with the law, the NPRM states:

> We are committed, however, to ensuring that incumbent LECs make their decisions to invest in and deploy advanced telecommunications services based on the market and their business plans, rather than regulation.[6]

In addition, the Commission correctly confirms its statutory duty not to favor any competitors or technologies, saying, "...Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[7] However, despite the Commission's "commitment" to market forces and its recognition that the Act calls for technological neutrality, the regulations proposed by the NPRM single out ILECs. Incumbents are prevented from providing broadband service via copper wire without the regulatory penalty and market handicap of strict structural separation.

Meanwhile, other potential "last mile" broadband providers, such as cable, satellite and wireless concerns, face no similar regulatory burdens. If the Commission desires a

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[5] NPRM, para. 19.
[6] *Ibid.*, para. 13.
[7] *Id.*, para. 11

pro-competitive environment, it will not subject ILECs to hurdles that other providers need not overcome. As it stands, the NPRM fails the competitive neutrality test. It also marks a retreat from the principle of technological neutrality because, by imposing discriminatory regulations on incumbent wireline providers, the Commission provides a regulatory advantage to providers that do not deliver their services via copper wire. In sharp contrast, to encourage efficient use of society's resources and accelerate nationwide broadband availability, which are central goals of the Act, the sensible course would be to remove regulatory barriers to avoid weakening marketplace incentives to increase the usefulness of already-deployed copper.[8]

III. APPLICATION OF THE SEPARATE AFFILIATE REQUIREMENTS TO RURAL LECS WILL DELAY THE AVAILABILITY OF BROADBAND SERVICES IN RURAL AREAS

The 1996 Act demonstrates Congress's recognition that significant differences in the markets served by small and rural ILECs require carefully tailored regulatory interventions.[9] Unlike the Act, the NPRM comes uncomfortably close to completely

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[8] This is not to suggest that other delivery mediums should be similarly burdened. Extending the proposed regulations to other delivery mediums would (a) also violate the deregulatory goals mandated by Congress, and (b) erect yet another barrier to the deployment of advanced services in rural areas. No technology or medium should be singled out and discriminated against. All should be subject to as little regulatory interference as possible.

[9] *See*, §§214(e) (different standards for duplicative universal service funding in rural ILEC areas), §251(f)(1) (exemption from incumbent LEC interconnection requirements absent specific state findings), 251(f)(2) (allowing states to suspend or modify burdens for most

ignoring the different circumstances faced by carriers in high-cost, sparsely populated areas. It does, however, ask if the separate affiliate requirements should apply to all LECs regardless of size.[10] The answer is an obvious and emphatic "No."

Simply put, small and rural carriers' incentives and ability to deploy broadband capability throughout their areas, already confronting the enormous cost barriers to such widespread deployment using any technology available at this time, will be severely dampened by the addition of the burdensome regulations suggested by the NPRM.[11] The NPRM lists seven new exacting and costly requirements for the establishment and operation of separate affiliates, if an ILEC wants to provide advanced capabilities on the unregulated basis open to any other provider.[12] The proposed new burdens can be expected to impair rural ILECs' investment incentives when it is remembered that customers in high-cost areas could not receive even their current voice service at affordable rates without universal service support.

The proposal would force small and rural ILECs that want to deploy advanced broadband infrastructure to choose between (a) integrated operations that would subject their advanced capabilities to tariff, rate and interconnection obligations not shared by competitors or (b) separately financed ILEC and advanced infrastructure affiliates, with

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small and midsize companies) and 253(f) (allowing states to limit competition to area-wide universal service).

[10] NPRM, para. 98.

[11] As demonstrated *infra*, the consequences of regulations on small entities must be considered under the Regulatory Flexibility Act (RFA). The Commission incorrectly determines that small LECs are not "small entities." (*See* NPRM, para. 222.)

[12] NPRM, para. 96.

completely independent operations and separate managements and employees. Offering this choice between two severe competitive disadvantages for broadband service simply multiplies the always-daunting obstacles to providing area-wide rural facilities and services.

The fixed costs and lost economies under the Commission's proposed separate subsidiary rules would make the project prohibitive for a small carrier. For example, the separate employees requirement is especially burdensome to small operations that typically must (a) optimize their cost-effectiveness by using employees with multiple functions, but also (b) draw on the smaller employee pool that characterizes rural communities. Even in the event the NPRM's extravagant financing, staffing and equipment requirements could somehow be met, the cost of such an undertaking would result in excessive prices in rural markets. Since these costs would have to be recovered from a small customer base, prices would have to be significantly higher than in large markets, regardless of the importance rural consumers may attach to having up-to-date network capabilities for rural economic development and participation in an increasingly information-rich future.

Faced with being forced to charge such high prices to consumers, few if any rural LECs will be able to develop a market for broadband services. Other providers, not burdened by similar mandates, may come to serve some customers, depending on local market conditions. However, there is no way to predict when consumers in remote, sparsely populated, high-cost areas will have access to these services. Without the ability of rural LECs to offer wireline broadband at reasonable rates, consumers in these areas

may well face delays lasting years or even longer. Thus, even in areas that may have a broadband provider already operating (or that will soon be operating), consumers will have been denied a choice due to overregulation.

The costs that will be added to rural advanced broadband deployment will be even more offensive to the intentions of the Act because they are unnecessary. The Commission already has in effect strong requirements for separating an ILEC's regulated and unregulated operations.[13] Thus, there is no need to impair the prospect of advanced broadband availability for rural consumers because of concerns that telephone subscribers will have to shoulder unfair cost burdens or that anti-competitive cross-subsidy would occur.

IV. IF PACKET-SWITCHED SERVICES ARE SUBJECT TO THE OBLIGATIONS OF §251, THE PRINCIPLES BEHIND THE RURAL EXEMPTIONS FOUND IN §251 MUST ALSO APPLY

The Act itself should make the questions of the above section moot for many rural ILECs, since Congress did not intend the Commission to impose these burdens on rural ILECs. The NPRM is based on the notion that LECs are "subject to the interconnection obligations of §251(c)(2) with respect to both circuit-switched and packet-switched networks."[14] The Commission "note[d]" that §251(f) exempts certain rural carriers from these requirements.[15] However, this exemption was apparently not considered further.

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[13] 47 C.F.R. §§64.901 *et seq.*
[14] NPRM, para. 18.
[15] *Id.*, para. 98.

Thus, it seems as if the Commission has decided that small and rural ILECs must forfeit their §251(f) exemptions, even if there has been no valid decision to terminate it under the law.

Further, the facts upon which Congress based these exemptions must be recalled. The different circumstances faced by rural carriers is reflected in §251(f). Any rules adopted as a result of this proceeding must further recognize that small, rural carriers operate in very distinct operational and business environments, whether the rural exemption is maintained or not.

If ILECs' packet-switched services are subject to the obligations found in §251, the exemptions provided for under §251 must apply as well. Therefore, the Commission is incorrect to assert that "all incumbent LECs"[16] must provide other carriers with interconnection and access to unbundled elements capable of delivering advanced services under §251(c). The Act specifically exempts incumbent rural LECs from these requirements until such time as (a) the rural LEC receives a bona fide request for such access, and (b) the State commission determines "that such request is not unduly economically burdensome, is technically feasible, and is consistent with §254...."[17] It is not in the Commission's jurisdiction to decide if any request will pass these tests, let alone to condition operation without §251's requirements to provide advanced broadband capabilities upon structural separation. Rather, Congress has left the power and obligation

[16] *Id.*, para. 11.
[17] 47 U.S.C., Sec. 251(f)(1)(A)

to evaluate when the exemption is no longer appropriate in the hands of the individual state commissions.

Therefore, the Commission should explicitly recognize that rural ILECs are already qualified to offer advanced services on an unregulated basis, without the need to establish costly affiliates. Even for small and rural ILECs that no longer have -- or that lose at some point in the future -- their §251 exemptions because of state termination decisions, the Commission should not impose the burden of using a fully separated subsidiary. Rural ILECs are already beginning to deploy advanced services to their customers, while customers in some much larger markets continue to wait. If rural ILECs are subject to the separate affiliate requirements, this trend may not continue due to prohibitive costs. Rural customers would likely have to wait until an unregulated new entrant decided to enter each market. As recent history has demonstrated in voice service, new entrants can be expected to "cream-skim" high-volume, low-cost customers, while directing little or no effort to meeting the needs of higher-cost residential subscribers. The need to encourage and actually facilitate advanced broadband development by minimizing regulatory barriers fully justifies a rule that no rural telephone company (as defined by §153(47) of the Act) should have to form a separate subsidiary to provide or continue to provide advanced infrastructure capabilities on an unregulated basis. Indeed, part of the task of moving towards market-driven telecommunications, while preserving universal service, is to allow firms to exercise their business judgment about the optimal corporate structure.

Further, as OPASTCO has previously advocated,[18] the Commission should recognize the initiative demonstrated by those rural LECs that are already providing advanced services by including a "grandfather" clause in any regulations that are ultimately adopted. This will assure that those customers who are currently receiving advanced wireline service will not be disrupted because regulations make the provision of such service unaffordable.

V. RESPONSE TO INITIAL REGULATORY FLEXIBILITY ANALYSIS: THE COMMISSION MUST PERFORM A REGULATORY FLEXIBILITY ANALYSIS AND CONSIDER HOW ITS DECISION WILL AFFECT THE ECONOMIC INTERESTS OF SMALL INCUMBENT LECS

In its Initial Regulatory Flexibility Analysis (IRFA), the Commission is incorrect in its tentative conclusion that the proposals in the NPRM "would impose minimal burdens on small entities."[19] As NRTA, OPASTCO and their partner in the Rural Telephone Coalition have shown in the past,[20] the Commission has attempted to evade its obligation under the RFA by relying on an erroneous definition of "small entities."

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[18] OPASTCO Comments, CC Docket No. 98-146, September 14, 1998, p. 5.
[19] NPRM, para. 226.
[20] *See* Rural Telephone Coalition Comments, CC Docket No. 96-262, Jan. 29, 1997, pp. 32-35; CC Docket No. 80-286, Dec. 10, 1997, p. 21.

According to the Commission, incumbent LECs are not "small entities" because they are "dominant" in their field.[21] However, the Small Business Administration (SBA) defines a small telecommunications entity as one with 1,500 employees.[22] Nonetheless, the Commission incorrectly asserts that the SBA has not "developed a definition for small LECs."[23] Of course, this is wrong. The SBA is charged with defining what a "small entity" is, and that agency has already considered that statutory criteria of "dominance" in arriving at its definition.[24]

Small incumbent LECs meet the SBA's definition of "small entity" and will be profoundly affected by the separate affiliate requirements proposed in this NPRM. It is therefore imperative that the Commission perform a proper RFA analysis using SBA definitions, so that it may consider any adverse impact the proposed rules will have on these companies and review alternatives which may reduce adverse impacts on the companies.

VI. CONCLUSION

The 1996 Act embodies national policy preferences for competition, deregulation and universal service, which §706 also expressly applies in directing the Commission to monitor and encourage the deployment of advanced broadband capabilities throughout the nation. The Act also contains several rural exceptions, exemptions and separate regulatory standards that prevent or delay the full application of the Act's most rigorous

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[21] NPRM., para. 222.
[22] 13 C.F.R. §121.902.
[23] NPRM, para. 223.
[24] 13 C.F.R. §121.902

pro-competitive interventions to rural ILECs and evidence the concern in Congress with accommodating the different conditions in areas served by rural ILECs. The NPRM's proposal to impair ILECs -- and especially small and rural ILECs -- in their efforts to meet the challenge of extending advanced broadband capabilities and services throughout their markets by requiring them to use a fully separated subsidiary or, apparently, to forgo the exemptions from excessive regulation of small ILECs, which Congress enacted in order to ensure continued reliable service for their customers, would conflict with the goals and policies of the Act. Similarly, small ILECs that do not have the rural exemption cannot be expected to compete under the costly regulations proposed by the Commission, and so must not be subject to them. The Commission should discard its proposal to require structural separation as a prerequisite for ILECs — and especially rural ILECs — to provide broadband capabilities and services on an unregulated basis.

Respectfully submitted,

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